



**IT IS ORDERED as set forth below:**

**Date: January 17, 2008**

*Mary Grace Diehl*

**Mary Grace Diehl  
U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

In re:	:	CASE NUMBER
	:	
<b>MOHAMMED A. FAIYAZ,</b>	:	<b>01-64875-MGD,</b>
	:	
Debtor.	:	CHAPTER 7
	:	

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**ORDER**

**THIS MATTER** is before the Court on the Motion Requesting the Court to Issue Orders Compelling the Trustee and Frank Dicus and Dicus Enterprises to Deposit \$587,377 in Court's Registry (the "Motion") by Suraiya A. Mateen, individually and as trustee of Suraiya Faiyaz Living Trust, and Mohammed A. Faiyaz ("Debtor") (Docket No. 191). The Motion was filed on October 23, 2007. The Trustee and Frank Dicus and Dicus Enterprises filed Responses to the Motion (Docket Nos. 192 & 196). A hearing was held on January 8, 2008, and Dr. Mateen, counsel for Frank Dicus and Dicus Enterprises ("Dicus") from the law firm of Weinstock & Scavo, P.C., and the attorney for the Chapter 7 Trustee were present. After the conclusion of the hearing,

supplemental pleadings were filed by Dicus and Dr. Mateen (Docket Nos. 195 & 197).

The Motion followed the September 28, 2007 District Court's reversal and remand<sup>1</sup> of this Court's Order and Judgment of May 5, 2004 (Docket No. 103). The District Court limited<sup>2</sup> its reversal and remand to this Court's erroneous reliance on the doctrine of res judicata in the May 5, 2004 Order and Judgment.<sup>3</sup> Specifically, the District Court noted that this Court erred in its factual findings that the state court judgment against the Debtor had not been appealed. In fact, at the time of this Court's May 5, 2004 Order and Judgment (Docket No. 103), the Debtor had filed an appeal with the Court of Appeals of Georgia. The District Court's remand to this Court was "in light of the proceedings that are ongoing in the Georgia State Courts." (1:04-cv-02137-CC, Docket No. 189, p.4).

State court litigation involving Dicus and Debtor, Dr. Mateen, and other relatives (the "defendants") has been extensive. In 1998, as a result of arbitration, Dicus secured an award that included detailed findings. The arbitrator determined that: "Defendants fraudulently and

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<sup>1</sup> Case No. 1:04-cv-02137-CC

<sup>2</sup> The September 28, 2007 District Court Order denied the following motions: (1) Emergency Motion of Appellant Suraiya Mateen to Declare the Interlocutory Orders of April 3, 2003 and Final Orders of December 23, 2003 as Null and Void, (2) Petition of Appellant Suraiya Mateen to Grant Her Emergency Motion Filed on May 26, 2005 and to Dismiss Trustees Amended Complaint to Determine Interest in Properties and Subsequent Proceedings and Orders, (3) Appellants's Motion Requesting the Court to Grant Her Motions Filed on Docket Nos. 23, 28, 30 & 39; and (4) Appellant's Request to Strike Off Appellee Dicus's Status Report Filed on April 16, 2007 and to Impose Sanctions Against His Attorneys.

<sup>3</sup> The following motions relate to the District Court's reversal and remand and were denied by the Court in May 5, 2004's Order and Judgment: (1) Debtor's Motion to Set Aside the Judgment Entered December 23, 2003, (2) Debtor's Motion to Stay Execution of the Judgment Entered December 23, 2003, (3) Debtor's Objection to Disbursement, and (4) Debtor's Amended Motion to Set Aside the Judgment Entered December 23, 2003.

intentionally breached their agreement with Plaintiffs and that Defendants willfully, wantonly and maliciously failed to perform under the agreement.” The arbitration award was reviewed by Fulton County Superior Court, and appealed to the Court of Appeals of Georgia. The award was affirmed. Faiyaz et al. v. Dicus et al., 537 S.E.2d 203 (Ga. Ct. App. 2000). Subsequently, Dicus brought a fraudulent conveyance action against the defendants. After years of discovery battles, sanctions, and non-compliance with sanctions, the Gwinnett County Superior Court struck the defendants’ answer and counterclaim and entered a default judgment against the defendants. Under court direction, the clerk of Gwinnett County Superior Court voided the land transfers at issue.

Subsequently, on April 10, 2001, Mr. Faiyaz filed a Chapter 7 petition. This Court lifted the stay for the remaining damages portion of the fraudulent conveyance action (Docket No. 41). The defendants failed to appear at the scheduled bench trial for damages, and the Superior Court entered a joint and several award and final judgment for \$689,690, including \$500,000 in punitive damages. Mateen et al. v. Dicus et al., 621 S.E.2d 487, 489 (Ga. Ct. App. 2005). The punitive damage award was made based on the finding that the defendants acted “with specific intent to cause harm.” Id. (referring to O.C.G.A. § 51-12-5.1). Defendants appealed the decision and the Georgia state courts have decided the issues. Mateen et al. v. Dicus et al., 621 S.E.2d 487 (Ga. Ct. App. 2005); Mateen et al. v. Dicus et al., 637 S.E.2d 377 (Ga. 2006); Mateen et al. v. Dicus, 650 S.E.2d 272 (Ga. Ct. App. 2007).

At the time the Motion was filed, Dr. Mateen had a pending writ of certiorari to the Supreme Court of Georgia. On January 7, 2008, the Supreme Court of Georgia denied the Dr. Mateen’s writ of certiorari, and she has now fully exhausted her state court remedies. In accord with the District Court’s remand and relying on the Supreme Court of Georgia’s denial of the Dr. Mateen’s writ of certiorari, the Court finds that the state court judgment is entitled to preclusive effect.

The law of the state in which a judgment has been rendered governs the question of whether that judgment can be plead in a federal court action as res judicata. Silent Automatic Sales Corp. v. Stayton, 45 F.2d 476 (8th Cir. 1930); Sharon v. Hill, 26 F. 337 (C.C. Cal. 1885); see also 28 U.S.C. § 1739. In Georgia, a “judgment is final as long as there is no right to appellate review.” Lexington Developers, Inc. v. O’Neal Construct. Co., 238 S.E. 2d 770 (Ga. Ct. App. 1977); see also Hurt v. Norwest Mtg., 580 S.E.2d 580 (Ga. Ct. App. 2003 ) (“final” means “a case in which a judgment has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied”). The Supreme Court of Georgia’s denial of the writ of certiorari now provides the Court preclusive use of the judgment in its application of res judicata to re-enter its May 5, 2004 Order and Judgment.<sup>4</sup>

Dr. Mateen’s supplemental pleading indicates that she filed a notice of intent to petition to the Supreme Court of the United States.<sup>5</sup> She argues that this notice of intent for filing a petition to the Supreme Court of the United States would prevent the Supreme Court of Georgia’s denial of her

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<sup>4</sup> Although the District Court relied on case law that limits the preclusive use of a judgment as long as there is a right to appellate review, there is a split of authority, in Georgia, as to when a judgment has preclusive effect. Georgia statute suggests that a judgment may have preclusive effect during the pendency of an appeal. O.C.G.A. § 9-12-40 (2007). Additionally, alternative case law reveals that a judgment is final for its preclusive effect unless and until the judgment is reversed or set aside by an appellate court. Pope v. Shipp, 144 S.E. 345 (Ga. Ct. App. 1928). In Pope, the Court of Appeals held that “[a] judgment of a court stands with full force and efficacy until it has been reversed or set aside. The mere pendency of a motion for a new trial can in no way affect the force and efficacy of the judgment to which the motion relates.” Id. at 346, n.3. An undecided appeal does not otherwise effect a judgment's finality. Davis v. First of Georgia Ins. Managers, Inc., 319 S.E.2d 517 (Ga. Ct. App. 1984); McDonald v. Hester, 155 S.E.2d 720 (Ga. Ct. App. 1967); see also Hawkins v. Risley, 984 F.2d 321, 324 (9th Cir. 1993); Jaffree v. Wallace, 837 F.2d 1461, 1466-67 (11th Cir. 1988).

<sup>5</sup> She includes a Notice of Intent filed with the Court of Appeals of Georgia pursuant to Ga. Ct. App. R. 38(b) in her pleading. However, Ga. Ct. App. R. 38(b)(2) requires that the Notice be filed “simultaneously with the filing of a petition to the Supreme Court of the United States.” Dr. Mateen makes no reference to compliance with Supreme Court Rule 12, although her time for petitioning the Supreme Court of the United States has not yet expired.

writ of certiorari to serve as a final judgment for its preclusive effect in this Court.

\_\_\_\_\_ Federal law, not state law, governs the question whether a pending appeal from a state court judgment to the Supreme Court of the United States prevents the judgment from operating as a bar in a federal court action. Oregonian R. Co. v. Oregon R. & Nav. Co., 27 F. 277 (C.C. Or. 1886); Hughes v Dundee Mortg. & Trust Invest. Co., 28 F. 40 (C.C. Or. 1886). Under federal law, the pendency of a writ of error from the judgment of a state court to the Supreme Court of the United States does not prevent the judgment from operating as res judicata in a subsequent action. Hughes v Dundee Mortg. & Trust Invest. Co., 28 F. 40 (C.C. Or. 1886); Hughes v. Dundee Mortg. & Trust Invest. Co., 28 F. 47 (C.C. Or. 1886) (following ; Hughes v Dundee Mortg. & Trust Invest. Co., 28 F. 40 (C.C. Or. 1886)). Here, Dr. Mateen's Notice of Intent does not rise to the level of a pending appeal to the Supreme Court of the United States. However, notwithstanding a hypothetical subsequent petition, this Court is entitled to give preclusive effect to the state court judgment. Accordingly, it is

**ORDERED** that the Motion is **DENIED**.

It is **FURTHER ORDERED** that the Court's May 5, 2004 Order and Judgment (Docket No. 189) be **RE-ENTERED** as of January 8, 2008 to reflect the resolution of the District Court's reversal and remand, in light of the Supreme Court of Georgia's denial of Ms. Mateen's writ of certiorari.

The Clerk is directed to serve a copy of this Order upon Debtor, Suraiya A. Mateen, the Chapter 7 Trustee, and the parties on the attached distribution list.

**END OF DOCUMENT**

**Distribution List:**

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